DEVELOPMENT & COMMERCIAL BANK BHD.

v.

PANDANGAN SELERA SDN. BHD. & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 23-621 OF 1987]
18 MARCH 1990

CIVIL PROCEDURE: *Leave to appeal - Allegation of nefarious collaboration by the plaintiff - Legal consequences flowing from legal documents executed - Denied by the defendants - Defendants attempting to overturn formal documents properly executed - Whether if true is defence in law.*

CIVIL PROCEDURE: *Terms of the application for leave - Judicial discretion - Matters at only interlocutory stage - Defendants have not come into Court with clean hands - Whether the Court should keep on open mind.*

This is an appeal by the 3rd and 4th defendants against the order of the Senior Assistant Registrar given on 19 August 1989 wherein the plaintiff's (the bank) obtained summary judgment in terms of the statement of claim. The Court allowed the appeal and gave the defendants leave to appeal upon terms after which the learned Judge certified that there was no requirement for further argument. Leave to appeal was granted.

Inter alia, upon the formal execution of the documents, and by 30 December 1982 there were,

(1) A formal debenture over all the assets of Pandangan; (2) A joint and several guarantee limited to 2 million ringgit executed by the second, third and fourth defendants; (3) Another joint and several guarantee up to a limit of RM2.4 million executed by the same parties.

The matter before the Court was the question of enforceability of the said guarantees. The facts that were relevant were that, "in consideration of the bank making or continuing advances or otherwise giving credit or affording banking facilities to Pandangan"; (b) that Pandangan defaulted, in making repayment; (c) that receivers and managers were appointed by the bank and (b) that in foreclosure proceedings initiated by the bank a recovery of a gross sum of approximately RM400,000 were realised from the sale of some of the Pandangan's properties. Sometime in 1987, the writ with the statement of claim was issued.

Pandangan did not enter appearance and judgment in default was entered against them. The second defendant was made a bankrupt in some other action and therefore was of no relevance to the said suit. The third and fourth defendants entered appearance and gave notice of resistance. That was on 30 March 1988. The banks's solicitors did not take the next step in the action till 4 August 1988 - a delay of four months by which time the pleadings had closed and since no reply had been filed, the issues were joined.

The issue before the Court is whether the bank was entitled to summary judgment for a lesser sum than the amount claimed in the writ. To put it another way should the defendants be given leave to defend for the whole, or part of the bank's claim, and if so for what part and on what terms.

Held:

[1] It was open to the plaintiffs to apply under O. 18 r. 19 of the RHC to strike out the defence if it did not disclose good grounds for resisting the claim. They could have entered the matter for trial after taking out a summons for directions.

[2] Applications for summary judgment must be made promptly. If the plaintiffs really thought there was no defence they could have applied immediately after appearance was entered.

[3] The SAR heard the arguments and gave summary judgment for the full amount claimed on 19 August 1989 but gave no reasons. This judgment was misconceived. There was no enquiry at all as to what, if any, was the precise sum due on the date of the judgment.

[4] Whether leave to defend should be given depends upon whether these allegations IF true would amount to a good defence. The difficulty here is that a finding that the defence is inherently incredible is an inference to be drawn from a whole mass of other averments whose credibility could only be tested after a full trial.

[5] In view of the nature of the allegations made it was safer to give the defendants leave to defend the whole of the plaintiff's claim, because IF true there was a good defence.

[6] The nature of the defence by itself was another reason for trial; But I gave leave to defend only upon terms, and this must be explained because it appears that the defendants may wish to appeal against this part of Order. I took the view that the terms on which leave to defend is given are discretionay, such discretion to be exercised judicially.

[7] In principle conditional leave is granted where there is something suspicious in the defendants mode of presenting their case, or if the defence is "shadowy", or if there are signs of bad faith. The usual term is to require the defendants to bring into Court within a specified time a sum representing the whole or part of the claim and in default leave to the plaintiff to sign final judgment.

[Following an oral application made by the plaintiff's solicitors, the Court made an order forthwith in favour of the plaintiff.]

Cases referred to:
Yeng Hing Enterprise Sdn. Bhd. v. Datuk Ong Poh Kan [1988] 2 CLJ (Rep) 564 ***(foll)***
Re Polish Bank [1932] 2 KB 353 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Richard Brockett (Paul Tan with him); M/s. Brockett & Cho
For the defendant - P. Suppiah; M/s. P. Suppiah & Co.
For the respondent - Selva; M/s. Raj, Selva & Co.

JUDGMENT

Mahadev Shankar J :

This is an appeal by the 3rd and 4th defendants against the order of the Senior Assistant Registrar on 19 August 1989 giving the plaintiffs (the bank) summary judgment in terms of the statement of claim.

I allowed the appeal and gave these defendants leave to appeal upon terms, after which I certified I required no further argument. They asked for leave to appeal which I granted. The reasons for my decision now follow.

On the face of it the bank's claim seems simple enough. The 1st defendant (Pandangan) applied in writing to the bank on 27 November 1982 for a loan "to invest and develop landed properties". The full amount of the loan was a bridging overdraft of RM2 million, a fixed loan of RM3.9 million, and end finance of RM3.5 million. In the document, the 2nd, 3rd and 4th defendants held themselves out as directors of Pandangan and the owners of the entire paid-up capital of Pandangan. This was RM1 million. Furthermore the document states that the company offered by way of security five lots of land in the Township of Johor Bahru (J.B.), one lot in the Mukim of Plentong, a debenture over Pandangan's assets, and another debenture over the assets of a company called Jecy Sdn. Bhd (Jecy). This security was for the fixed loan and the bridging overdraft. For the end finance Pandangan offered the corporate guarantee of Pandangan and Jecy.

The bank responded to this application by way of a written acceptance letter dated 16 December 1982. Two of the five J.B. lots offered by way of security is called the "Sekolah Arab" land, one lot the Mohamed Amin land and one lot the Straits View land. The basis of the acceptance letter is that these four lots were already registered in Pandangan's name. One lot that is, Grant 8223 of Lot 1085 in J.B. was at the time the subject of an option dated 18 November 1982 and the scheme appears to have envisaged that Pandangan would exercise the option and after this land was acquired by it, Pandangan would also make it available as security. The acceptance letter was subject to conditions and it was subject to formal contract.

The execution of the formal documents quickly followed and by 30 December 1982 there were *inter alia*

(1) A formal debenture over all the assets of Pandangan;

(2) A joint and several guarantee Ltd. to RM2 million executed by the second, third and fourth defendants;

(3) Another joint and several guarantee up to a limit of RM2.4 million executed by the same parties.

In this appeal we are only concerned with the enforceability of these two guarantees. I therefore do not propose to over-concern myself with the other securities executed to secure these loans except to say:

(a) that both guarantees state that they are " in consideration of the bank making or continuing advances or otherwise giving credit or affording banking facilities ... to Pandangan";

(b) that Pandangan defaulted, in making repayment;

(c) that receivers and managers were appointed by the bank and

(d) that in foreclosure proceedings initiated by the bank a recovery of a gross sum of approximately RM400,000 was realised from the sale of some of the Pandangan's properties.

By 7 July 1986 Pandangan's indebtedness to the bank stood at RM6,663,888.29 and on 22 July 1986 a separate demand was sent to each of the 2nd, 3rd and 4th defendants as guarantors, for the repayment of this sum. Remembering that the first guarantee was for RM2 million and the second was for RM2.4 million, on 18 September 1986 the bank's solicitors sent a separate demand letter to each of the guarantors aforesaid for the payment of RM4.4 million.

They did not pay. As at 27 April 1987 the total amount due was RM7,293,171.91. On 30 April 1987 the bank filed their writ in this action with their statement of claim indorsed for the recovery of this sum, bank interest thereon at 12% per annum with monthly rests (that is, compound interest), costs and further relief.

Pandangan did not enter appearance and judgment in default was entered against them. The second defendant was made a bankrupt in some other action and we are not concerned with him. The third and fourth defendants (these defendants) entered appearance and gave notice of resistance.

At first it seems there were some negotiations going on, so no defence was filed. These negotiations aborted. The bank's solicitors then gave these defendants' solicitors notice to file their defence. They did so - a voluminuous pleading setting out in some detail the matters on which they relied to exculpate themselves from liability. That was on 30 March 1988. The bank's solicitors did not take the next step in the action till 4 August 1988 - a delay of four months by which time the pleadings had closed and since no reply had been filed, the issues were joined.

As Suppiah has pointed out it was open to the plaintiffs to apply under O. 18 r. 19 of the RHC to apply to strike out the defence if it did not disclose good grounds for resisting the claim. They did not do this. They could have entered the matter for trial after taking out a summons for directions. This too they did not do. Applications for summary judgment must be made promptly. If the plaintiffs really thought there was no defence they could have applied immediately after appearance was entered. Had they done so these defendants would have to file a full affidavit giving chapter and verse why they should be given leave to defend. Since the plaintiffs did not, what these defendants did after service of the application was to affirm an affidavit relying substantially on the averments already pleaded in their defence and undertaking to make good these averments at the trial.

The facts in this case are admittedly quite complex. The SAR heard the arguments on 3 June 1989. She gave summary judgment on 19 August 1989 for the full amount claimed but gave no reasons.

This judgment was misconceived. Even if the bank was entitled to enforce both the guarantees against these defendants the maximum judgment the bank could have got was for RM4.4 million. Besides the plaintiffs had effected part recovery by selling off some of the properties of Pandangan. The bank's manager had issued a certificate on 16 November 1988 that the amount outstanding as on 27 April 1987 was the amount claimed in the writ. The value of this certificate on 3 June 1989 was problematical. There was no enquiry at all as to what, if any, was the precise sum due on the date of the judgment.

The crux of this case however is whether the bank was entitled to summary judgment for a lesser sum than the amount claimed in the writ. To put it another way should these

defendants be given leave to defend for the whole, or part of the bank's claim, and if so for what part and on what terms.

The big picture of what was being contended for the defendants was as follows.

Prior to the execution of the guarantees by these defendants, the bank was desirous of having its shares listed in the Kuala Lumpur Stock Exchange. So the bank had to present a good face to the relevant authorities. Some huge bad debts had to be first extinguished. This feat of legerdemain was achieved by the bank itself providing funds to third parties, including these defendants to buy the collateral for these bad debts. The purchase price was used to clear the bad debts from the bank's books. Thus these defendants contend that the moneys which are the subject of the guarantees were not in fact "loans" to Pandangan as true borrowers. Pandangan, so they say, was the bank's agent in this rescue scheme. To ensure the funds were adequate these defendants say that the collateral for the bad loans, had to be purchased at inflated prices. Pandangan had to offer its own securities as part collateral for the loans the bank was going to make. These defendants say that since some part of the moneys provided by the bank had to be utilised to obtain these securities, the moneys were paid first, and the loan documentation back dated. So the legal consequences flowing from all this was that the loans now sought to be recovered were in fact not loans to the defendants at all, but for the plaintiffs themselves and Pandangan was in fact acting as the bank's agent, and not as a true borrower. In short the entire exercise was a sham, and the documents upon which the bank now relies to effect recovery were spurious, since the bank's general manager and its local manager in Johor Bahru had agreed with these defendants and the others involved that the documents were purely cosmetic and not intended to have any legal effect.

Very substantial details of this alleged scheme naming names, dates and places are set out with some particularity in 36 sub-paras. of para. 7 of the statement of defence (encl. 27), which runs into some fourteen pages. It is unnecessary to repeat them here. Needless to say the sting in these allegations have been denied by the bank's manager in Johor Bahru.

Whether leave to defend should be given depends upon whether these allegations **if** true would amount to a good defence. The answer to that question has to be yes, but Paul Tan of Counsel for the bank at first sought to suggest that they are so inherently incredible that this Court should not countenance them but give judgment forthwith. But in his final reply he conceded that at best he could only get judgment for RM 4.4 million on the two guarantees leaving the rest to go for trial.

The difficulty here is that a finding that the defence is inherently incredible is an inference to be drawn from a whole mass of other averments whose credibility could only be tested after a full trial. In view of the nature of the allegations made it was safer to give the defendants leave to defend the whole of the plaintiffs' claim, because IF true there was a good defence. The nature of the defence by itself was another reason for trial: See *Yeng Hing Enterprise Sdn. Bhd. v. Datuk Ong Poh Kan* [1988] 2 CLJ (Rep) 564.

But I gave leave to defend only upon terms, and this must be explained because it appears that the defendants may wish to appeal against this part of my order.

I took the view that the terms on which leave to defend is given are discretionary, such

discretion to be exercised judicially. It would be invidious to go too deep into the allegations made by these defendants since we are only at an interlocutory stage. The Court should endeavour to keep an open mind till the trial is over.

But **if** what is alleged by the defendants is true it is manifestly obvious that these defendants have not come into Court with clean hands. The second defendant was a partner of the firm who were the auditors of the bank. The third defendant appears to be a public accountant. The fourth was a director of several companies. They were described as "professionals" in the submissions made to me. Precisely what category of professionals they belong to can be left for the trial. What must be said now is that they are asserting that they signed spurious documents to advance a nefarious scheme. What was there in it for them? Who were the defendants helping to deceive? These too are questions for the trial.

The Registrar thought so little of the defence that she gave the plaintiffs summary judgment. Paul Tan of Counsel for the plaintiff has submitted that the defence allegations are inherently incredible. Indeed the terms of the written documents which the defendants solemnly signed are diametrically opposed to what the defendants now claim. In principle conditional leave is granted where there is something suspicious in the defendants' mode of presenting their case, or if the defence is "shadowy", or if there are signs of bad faith. (See SCP 1979 para. 14/3 -4/13). The defence in this case is all these things and the defendants are seeking to overturn formal documents which they had executed because they allegedly participated in some nefarious scheme to get round by deception the criteria laid down by the authorities before a private banking institution can go public. It is in these circumstances that I exercised my discretion to grant conditional leave only. The usual term is to require the defendants to bring into Court within a specified time a sum representing the whole or part of the claim and in default leave to the plaintiff to sign final judgment. *Re Polish Bank* [1932] 2 KB 353. The amount to be specified is not capable of mathematical measurement since it arises from the exercise of a very wide discretion. In deciding the figure should be RM1.5 million and not RM4.4 million, I was partly influenced by the defence contention that both the guarantees carry the same date. It was contended therefore that the second had no consideration to support it since it was based on the same consideration as the first. There may be very little substance in this but some explanation from the bank is desirable. I applied the *contra proferentum* rule and took the lesser of the two guarantees as the basis for security. Since there is already a sum of RM400,000 in Court from the sale of some property of Pandangan RM1.5 million to my mind was the right figure.

So this is what these defendants must deposit in Court or secure to the satisfaction of the plaintiff within the time limited or submit to judgment for RM4.4 million and costs. I gave the parties liberty to apply in case other matters arise for the working out of this order. As I heard arguments going over two days I did not think any useful purpose would be served in having any further argument in open Court. I therefore certified accordingly and gave leave to appeal. But in cases of this kind it seems to me that it would serve the interests of the parties and the cause of justice better if there should be an early trial.

Since these defendants succeeded in this appeal in reversing the Registrar's order I gave them the costs of the appeal in any event.

After I delivered the above judgment, Mr. Paul Tan made an oral application for final judgment against the third and fourth defendants on the ground that they had not

complied with the terms I had imposed for leave to defend *viz.* they had not deposited RM1.5 million in Court within the four-week period or at all nor had they secured the same to the satisfaction of the plaintiff. Under Clause 12 of the guarantee the plaintiff was also entitled to interest. In the circumstances I made an order forthwith that the third and fourth defendants do pay the plaintiff the sum of RM.4.4 million together with interest thereon at the rate of 12% per annum with monthly rests as from 18 September 1986 being the date of demand up to realisation and the costs of this action.

Also found at [1992] 1 CLJ 404